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Nos. 94-1893 and 94-1900

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, ET AL.

NATIONAL CABLE TELEVISION ASSOCIATION, INC., PETITIONER

v.

BELL ATLANTIC CORPORATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM IN SUPPORT OF SUGGESTION OF MOOTNESS

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9

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1. In Section 302 of the Telecommunications Act of 1996 (1996 Act), Congress (a) *repealed* the prohibition in former 47 U.S.C. 533(b) against cross-ownership of local exchange carriers (LECs) and traditional cable

systems in the same area;[1] (b) *authorized* LECs immediately to offer cable service, even over their own telephone wires in their own service areas;[2] (c) *also authorized* LECs to operate "open video systems" over their telephone wires, subject only to regulations to be issued by the Federal Communications Commission (FCC) within six months, consistent with the "public interest, convenience, and necessity;"[3] and (d) *reduced* regulatory burdens on LEC operation of open video systems by, among other things, exempting such systems from municipal franchising and the leased-access requirement applicable

[1] Telecommunications Act of 1996, Pub. L. No. 104-104 (1996 Act), § 302(b)(1).

[2] Under new Section 651(a)(3) of the Communications Act, as added by Section 302(a) of the 1996 Act, a LEC may operate a "cable system," *or* it may operate an "open video system." Only open video systems must be operated in accordance with the regulations to be issued by the FCC. Operation of an open video system does carry certain advantages over operation of a cable system, such as freedom from municipal franchising requirements and leased-access requirements applicable to operators of traditional cable systems. See new Section 653(c)(1) (exempting open video systems from Section 612 and part III, which includes Section 621, of the Communications Act, 47 U.S.C. 532, 541). On the other hand, operation of a cable system may carry certain advantages, such as freedom from the requirement that capacity be shared if demand for carriage exceeds available channel capacity. See new Section 653(b)(1)(B). The choice of the governing legal regime, however, is largely up to the LECs' election, and in any event LECs are currently free to offer cable service over their telephone wires, if they comply with the generally applicable provisions of Title VI of the Communications Act, covering all cable operators.

[3] 1996 Act § 302(a) (adding new Section 653(a)(1) to Communications Act).

to cable operators.[4] The congressional policy is therefore no longer to prohibit LECs' provision of video programming in their service areas, but rather broadly to permit it. Only if a LEC elects to offer video programming by means of an open video system rather than a cable system—a matter within its control—must it comply with regulations to be developed by the FCC. That regulatory scheme is required by the statute in order to provide safeguards to prevent LECs from discriminating against unaffiliated programmers carried on open video systems and charging unjust and unreasonable rates for carriage on such systems, and, if demand for carriage exceeds channel capacity, to require LECs to share channel capacity with unaffiliated programmers. See 1996 Act § 302(a) (adding new Section 652(b) of the Communications Act).

Given this sweeping change in federal telecommunications policy, it is manifest that, at a minimum, the legislation has been "sufficiently altered so as to present a substantially different controversy than the one the [lower courts] originally decided." *Northeastern Florida Chapter of Associated General Contractors* v. *City of Jacksonville*, 113 S. Ct. 2297, 2301 n.3 (1993). LECs may now build and operate new cable systems. They may also offer cable service over their telephone wires, subject only to the regulations applicable to all cable operators under Title VI of the Communications Act. No approval by the FCC is necessary for LECs to offer such cable service.

Under the 1996 Act, LECs have the additional option of operating an open video system. If a LEC elects to operate such an open video system, then

[4] 1996 Act § 302(a) (adding new Section 653(c)).

approval by the FCC is necessary. It is difficult to understand how the availability of this additional option disadvantages them in any fashion. But, even if the new legislation does "burden" LECs operating open video systems to a modest degree, because they will be subject to regulatory safeguards to be developed by the FCC—an approach they have long championed as a more narrowly tailored alternative to the cross-ownership bar—it surely does not burden them "in the same fundamental way" as was the case under the former Section 533(b). *Northeastern Florida Contractors*, 113 S. Ct. at 2301. The prohibition imposed by former Section 533(b) on cross-ownership of telephone companies and cable systems no longer exists; accordingly, respondents' challenge to that Section is moot. See *Kremens* v. *Bartley*, 431 U.S. 119, 126-127 (1977); *Princeton University* v. *Schmid*, 455 U.S. 100, 103 (1982); *United Building & Construction Trades Council* v. *Mayor and Council*, 465 U.S. 208, 213 (1984).

This Court must review the judgment of the court of appeals in light of presently existing federal statutory law, not the law in effect at the time that judgment was entered. *Kremens*, 431 U.S. at 129; *Fusari* v. *Steinberg*, 419 U.S. 379, 387 (1975). It also bears emphasis that this case involves the constitutionality of an Act of Congress; time and again, the Court has admonished that, "[c]onstitutional adjudication being a matter of 'great gravity and delicacy,'" courts should "avoid passing prematurely on constitutional questions." *Kremens*, 431 U.S. at 128 (quoting *Ashwander* v. *TVA*, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring)). Whatever may be the constitutional issues raised by the provisions of the new legislation requiring the FCC to issue regulatory safeguards against discriminatory conduct on open video systems, those issues have not yet been addressed by any court. At this point, any disputes over those issues "are so unfocused as to make informed resolution of them almost impossible." *Kremens*, 431 U.S. at 134. All of the constitutional issues raised by the case—including the choice between strict scrutiny and intermediate scrutiny, and the proper application of the requisite level of scrutiny—have been fundamentally altered by the enactment of the new legislation. It would not be appropriate for this Court, having granted review to consider the validity of now-repealed legislation, to review the constitutionality of the new law, which has not been the subject of briefing and argument.[5]

Respondents have invoked authority to the effect that "voluntary cessation" of challenged conduct will not moot a controversy, but the Court has not hesi-

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[5] For example: respondents acknowledge that the new legislation offers them an important "alternative channel of communication" (a traditional cable system), but they assert that, until the FCC issues new regulations, they are subject to a "ban" on operating open video systems. They therefore argue that the new legislation still fails constitutional muster because a ban on the provision of video programming to subscribers, "whatever its scope of duration," must fail intermediate scrutiny. Resp. 3-4. A substantial portion of the briefs was devoted to examining, under intermediate scrutiny, the adequacy of alternative channels of communication available to respondents, at a time when respondents were not permitted to operate traditional cable systems, but when the FCC was already moving to permit them to operate video dialtone systems. The 1996 Act has so greatly expanded the opportunities for speech available to respondents that the briefs submitted in these cases would be inadequate for resolving any issue presented by the new legislation.

tated to find a case moot when a statute under constitutional challenge has been repealed after plenary review has been granted. See *Department of Justice* v. *Galioto*, 477 U.S. 556 (1986); *Kremens*, 431 U.S. at 126-127; *Princeton University* v. *Schmid*, 455 U.S. at 103. Although there may be a limited exception to that rule when it appears likely that "the repeal of the objectionable language would not preclude [the authorities] from reenacting precisely the same provision," *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982), such a possibility is obviously remote and highly speculative in this situation. The repeal of Section 533(b) was effected, as part of a fundamental restructuring of the Communications Act, after years of close consideration by Congress, and in light of new technological developments. In these circumstances, for the Court to render a decision based on whether the now-repealed provision was constitutionally valid would be tantamount to the issuance of an advisory opinion.

2. There is also no merit to respondents' suggestion that the Court should dismiss the petitions for a writ of certiorari, rather than vacate the judgment below. *Galioto* and *Kremens* make clear that vacatur has been the Court's consistent practice when the mootness has been caused by the repeal of the challenged legislation after the Court's grant of plenary review. "In such circumstances, 'it is the duty of the appellate court to set aside the decree below[.]'" *Galioto*, 477 U.S. at 560 (citing, *inter alia*, *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950)).

For the foregoing reasons, and for the reasons set forth in our suggestion of mootness, the judgment of the court of appeals should be vacated, and these cases should be remanded with instructions to dismiss them as moot.

Respectfully submitted.

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